

**ROBERT L. MCCOY**  
Claimant

**BETHANY LUTHERAN CHURCH**  
Respondent

**TIG PREMIER INSURANCE COMPANY**  
Insurance Carrier

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## ORDER

## ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent?
- (2) Did claimant provide timely notice of accident pursuant to K.S.A. 44-520?

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant was employed as a custodian for respondent. He alleges that on October 29, 2002, he was pulling a buffer up a stairway when he felt pain in his right shoulder and numbness in his fingers. Claimant had experienced ongoing problems with that shoulder for many years. In fact, claimant had been recommended for a total shoulder

replacement by James L. Gluck, M.D., in June of 2000 and by Craig Parman, M.D., in January of 2001. Claimant respectfully declined the surgery. Claimant had ongoing shoulder difficulties and received prescription pain killers for the pain in his shoulder and right upper extremity, including Vioxx (beginning June 7, 2000) and Lortab (beginning January 5, 2001).

In his letter of January 27, 2003, Dr. Gluck advised that claimant's ongoing shoulder problems were the result of shoulder arthrosis and degenerative changes in the cartilage, typical of degenerative arthrosis. Dr. Gluck opined that this was not caused by his employment as a firefighter, which claimant had retired from several years before, nor his work as a maintenance worker at the Lutheran Church.

After claimant suffered the alleged injury on October 29, he went to Dr. Parman on November 5, 2002. Claimant provided an off-work slip to the church secretary, Rebecca Meyer, on approximately November 6, 2002. However, at that time, there was no mention in Dr. Parman's note nor by claimant of any work-related connection to his ongoing shoulder problems. Respondent was aware of the fact that claimant had a long history of shoulder difficulties.

The histories provided Dr. Parman and Dr. Gluck made no initial mention of a work-related connection to claimant's shoulder problems.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> In this instance, the evidence supports a finding that claimant has had ongoing, long-term shoulder problems for many years. The shoulder replacement surgery, which is currently being recommended, was initially recommended by Dr. Gluck in June of 2000, over two years prior to the alleged date of accident here. When claimant suffered the alleged injury, he failed to advise the doctors who initially treated him of a work-related connection to his shoulder complaints. When claimant took the off-work slip to respondent's church secretary, Ms. Meyer, he failed to mention to her any work-related connection to his shoulder complaints. The first indication that claimant alleged a work-related connection was on November 20, 2002, when he filled out a workers' compensation report.

K.S.A. 44-520 obligates that notice of accident with specific information be provided to respondent within ten days of the accident. The November 20, 2002 workers' compensation report was well beyond the ten-day limitation set forth in K.S.A. 44-520 when considering an October 29, 2002 alleged accident. The Board finds that claimant has failed to provide timely notice of accident, as is required by K.S.A. 44-520.

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

Additionally, based upon the opinion Dr. Gluck, the Board finds claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment. Claimant's long history of shoulder problems stems from many years as a firefighter and also stems from his ongoing degenerative arthrosis condition in the shoulder. Dr. Gluck's opinion is that there is no direct connection between his work at the Lutheran Church and the ongoing shoulder problems. Additionally, the Board finds it significant that the shoulder surgery being recommended currently is the same shoulder surgery which was recommended over two years earlier.

The Board, therefore, finds claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment.

The Order of the Administrative Law Judge denying claimant benefits based both on a lack of proof of accidental injury arising out of and in the course of employment and a lack of timely notice should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 8, 2003, denying claimant benefits in the above matter, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2003.

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant  
Kirby A. Vernon, Attorney for Respondent  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Director